AUG 5 1954
HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

Fischer & Porter Company
petitioner

vs

Brooks Rotameter Company
respondent

No. 262
October Term,
1954

Petition for Writ of Certiorari

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PX is used as an abbreviation or prefix denoting Plaintiff's Exhibits

DX is used as an abbreviation or prefix denoting Defendant's Exhibits

Where deemed desirable to refer to any particular line or lines on a referenced page of *Appendix* or of an exhibit, a diagonal (/) follows the page-number, and the numbers following the diagonal (/) refer to the particular line or lines on such page.

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Petition for Writ of Certiorari

To the Honorable The Chief Justice
and the Associate Justices of the
Supreme Court of the United States

The Fischer & Porter Company, by its undersigned attorney, hereby respectfully petitions for a writ of certiorari to review the decision and Judgment, in this action, of the United States Court of Appeals for the Third Circuit.

References to the Opinions below

The Opinion of the District Court is reported at 107 F. Supp. 1010 and is also reproduced on pages 306a to 318a, inclusive, of *Volume I of Joint Appendix* filed in the Court of Appeals in this action.

The Opinion of the Court of Appeals is reported at 211 F. 2d 400, and is also reproduced on page 615a of the *Supplemental Appendix* filed herewith.

Statements of grounds on which jurisdiction is invoked

The Judgment and Opinion of the Court of Appeals sought to be reviewed are dated and were entered on April 7, 1954.

On July 3, 1954 this Court entered an Order extending the time within which to petition for certiorari, to and including August 5, 1954.

Jurisdiction to review the aforesaid Judgment and Opinion of the said Court of Appeals is believed to be conferred on this Court by paragraph (1) of Section 1254 of Title 28 of the United States Code.

Record filed herewith

There are filed herewith a certified copy and nine additional copies, in accordance with Rule 21(4), of *Volume I of Joint Appendix* printed for the use of the Court below.

There is also filed herewith, under a separate printed cover entitled in the case, *in this Court*, and marked "*Parts of Volume II of Joint Appendix*", nine additional copies of

the Fischer patent-in-suit (PX-1) and of the prior Cox rotameter patents (DXs 13, 15 & 22) and prior patents (DXs 9, 11 & 14) from other arts relied on by the Court below, and of Cox patent 2,604,784 * (PX-62) relied upon by petitioner on its Motion (318a) below, for reconsideration and for new trial under Rule 59-a(1) and to reopen under Rule 60-b; these prior-art patents and the last-mentioned Cox patent being parts of *Volume II of Joint Appendix* printed for the use of the Court below (a certified copy of which is filed herewith). These additional copies of the prior-art patents and the last-mentioned patent are paginated the same as they are in the certified copy of *Volume II of Joint Appendix.*

On pages *v to viii* of the "Table of Contents of Joint Appendix", of *Volume I of Joint Appendix*, is an identifying descriptive list of Exhibits, indicating the pages of *Volumes I & II of Joint Appendix* where the respective exhibits are reproduced.

There is also filed herewith, under a separate printed cover entitled in the case, *in this Court*, and marked *"Supplemental Appendix to the Petition for Writ of Certiorari"*, nine additional copies (a) of the *Supplemental Appendix* printed for the use of the Court below, (b) of the Opinion of the Court of Appeals, and (c) of excerpts from the Transcript of the Hearing in the Court of Appeals filed by the Clerk of that Court, and a certified copy of which is filed herewith.

Questions presented for review

1) Is an admittedly unanticipated patent on an important industrial control instrument, namely, a rate-of-flow meter since widely adopted to measure, record and control critical rates of flow of liquids and gases in complex chemical processes and process industries, which

represents an outstanding contribution to more efficient and safer plant operations and

replaced the flow-meter of the prior-art relied on by

* issued right after the trial

defendant which prior-art flow-meter the Court found "was something *entirely* different", and is based on a scientific principle discovered by the patentee thereof in the important, difficult field of fluid-dynamics long challenging many highly skilled scientists and engineers and in which field the end-results of even the most persistent research are largely unpredictable by those skilled in the art,

to be held invalid by a judgment notwithstanding the verdict, on the authority of this Court's decision in the case of the *Great Atlantic & Pacific Tea Co. vs Supermarket Equipment Corp.* (340 U. S. 154) which was based on a most obvious mechanical device consisting of a cashier's counter equipped with a three-sided wooden package-pusher frame slidable thereon, found to be fully anticipated by the prior-art except for an extension of the counter, not mentioned in the claims;—

where, in the case at bar, every criterion of invention recognized by the Courts, is met, including 25 years of persistent but fruitless research of the prior-art-worker (relied on by defendant) an eminent scientist most skilled in flow-meter art, and the conclusively established unobviousness * of the differences between the subject matter of the patent-in-suit and the prior-art and the inability of prior-art-workers to foresee or predict that such differ-

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* unobvious to defendant's witness Cox, the person most skilled in the art, an eminent scientist who had researched in this art for decades in an effort to achieve the results achieved by the invention of the patent-in-suit, and who is the patentee of the prior patents (DXs 13, 15 & 22) relied on by defendant, as to which prior patents the Courts below found that *"Cox's conception of flutes or ribs for his tube was something entirely different"* (316a/3-5) from the invention of the patent-in-suit and that *"Cox was not the conscious originator of the idea of using convex ribs occupying a smaller part of the cross-section of the tube"* (317a/17-19) which is a part of the claimed subject matter of the patent-in-suit, and that *Cox's "rotameters . . . do not embody the concept described in the patent (in suit), and . . . cannot be asserted against the validity of the patent (in suit)"* (317a/24-27)

ences would result in the improved metering functions achieved by the flowmeter of the patent-in-suit. †

2) Where the patent-in-suit is admittedly not anticipated and the nearest prior-art is held by the Court to be "something entirely different" and where the device of the patent-in-suit is found to produce an industrially important improvement in the operation of the device, which was not obvious to the patentee of the prior-art patents who testified, is patentability negatived by the fact that the improvement in the operational-results or functioning of the device (over the prior-art) is one of degree and not one of kind; where the physical structures are different and the respective theories motivating the prior-art worker's and the patentee's choice of the two different structures are likewise different, and where the former had for decades either failed to perceive or wrongly appraised and rejected the latter's theory?

3) Is this Court's decision in the *A & P case*, supra, (based, as it was, on a fully anticipated and otherwise obviously

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† by the Court: "'there is no doubt that the Fischer tube is easier and simpler to make than the Cox tube . . . it is easier to draw or press the glass down into the grooves of the mandrel used in making Fischer's instrument than into the more pronounced recesses of the mandrel on which the Cox tubes are formed. The result is that the instruments can be manufactured comparatively cheaply while still maintaining a good degree of accuracy. All this makes for stability in industry" (309a/14-24), and "*there seems to be little doubt that Fischer's greater range of viscosity immunity gives his instrument a very considerable advantage as an article of ordinary industrial use. . . . Fischer's rotameter has had a substantial degree of commercial success*", and "the defendant, although licensed under the Cox patent, chose to court an infringement suit by making and selling the device of the patent in suit) in preference to any other." (311a/24-33), and ". . . *the Fischer patent has a greater range of viscosity immunity than that of the prior-art instruments . . . is more satisfactory for industrial uses* . . . is easier to make and . . . can be sold more cheaply" (312a/2-6), and "*The longer range of Fischer no doubt made his rotameter more satisfactory industrially* . . ." (312a/-22-24) and that Fischer did "carry the improvement in viscosity immunity of rotameters somewhat beyond Cox, and that in the meter of range . . ." (313a/22-24) and Fischer "made a somewhat better and more salable instrument for industrial use . . ." (313a/27-29)

uninventive "gadget"), authority for invalidating an admittedly unanticipated patent which the Court found had resulted in an industrially important improvement in operational results and which the Court's fact-findings show had pushed back the frontiers of science and added to the sum of useful knowledge to the significant and lasting benefit to industry and the public?

4) Where the invention of the patent-in-suit is admittedly not anticipated and represents an industrially important improvement in a scientific field, and the Court subsequently finds that the nearest prior-art relied on by defendant is "something entirely different" and does "not embody the concept described in the patent (in suit), and . . . . . cannot be asserted against the validity of the patent", and the evidence shows that it was not obvious to the most skilled person in the art (the patentee of the prior-art patents relied on by defendant) that the differences between the prior-art and the patent-in-suit would result in the improvements which the Court found did result from the patent-in-suit, is this Court's decision in the *A & P case*, supra, authority for overruling a jury's fact-finding of invention implied in its verdict for plaintiff and for entering judgment n. o. v. for defendant?

5) Is a mechanical patent which in its drawings shows in full detail, and to scale, a single embodiment of the claimed invention, which the specification of the patent says is the preferred embodiment, and of which so-illustrated preferred embodiment defendant's accused devices (found by the Court to be most clear infringements) are substantial replicas in all respects, to be held invalid under 35 U. S. C. 33 relating to "definiteness", because of the inclusion in the claims thereof

a) the time-honored phrase "a plurality of" widely used in patent-claims and *never* before the basis of invalidating a claim for "indefiniteness" under 35 U. S. C. 33 in any reported case, but, on the con-

trary, approved by decisions of this and other Courts

or

b) the time-honored phrase "relatively" or "relatively small" widely used in patent-claims and approved by the decisions of this and other Courts as entirely sufficient where the drawings and specifications clearly reveal what the inventor considered was the preferred form and where veering from the embodiment shown in the drawing (and indicated by the specification and claims) in the direction of the prior-art structure, is clearly contra-indicated by the whole tenor of the patent?

6) Is a patent whose claims

a) defendant stipulated are not readable upon the prior-art (which prior-art the Court found "was something entirely different") and

b) are squarely readable upon defendant's accused devices (so that the claims admittedly represent a clear enough line of demarcation between the prior-art and the defendant's accused device)

to be held invalid for indefiniteness under 35 U. S. C. 33, on the reasoning of the Courts below (which would be applicable to virtually all patents) that by departing from the structure called for by the patent-in-suit in the direction of the prior-art, the improvements, advantages or benefits which result from following the teachings of the patent-in-suit will be lost and the undesirable structure of the prior-art will be reached?

Reasons relied on for the granting of the writ of certiorari

1. The decision of the Court of Appeals (in affirming, and, in effect, adopting as its own, the decision of the District Court), is in conflict with the following decisions of this Court and of other Courts of Appeals, on important principles and rules of law and their application to the undisputed facts of this case.

1-a. As to the patentability of unanticipated subject matter, the decision of the Court of Appeals is in conflict with the following decisions of this court:

A & P vs Supermarket, 340 U. S. 154
Goodyear vs Ray-O-Vac, 321 U. S. 275
Williams vs United Shoe, 316 U. S. 364
Smith vs Snow, 294 U. S. 1
Minerals Separation vs Hyde, 242 U. S. 261
Diamond vs Consolidated Rubber, 220 U. S. 428
The Barbed Wire Patent, 143 U. S. 275

and is in conflict with the following decisions of other Courts of Appeals in their interpretation of this Court's decision in the *A & P case*, supra:

Southern vs USCO, 209 F. 2d 111 (5 Cir.)
E-I-M Co. vs Philadelphia Gear, 205 F. 2d 28 (5 Cir.)
American Chain vs Rochester Ropes, 199 F. 2d 325 (4 Cir.)
Aeration vs Lange, 196 F. 2d 981 (8 Cir.)
Oliver vs Silver, 206 F. 2d 658 (10 Cir.)

1-b. As to the matter of "definiteness" of claims, the decision of the Court of Appeals is in direct conflict with the following decisions of this Court and of other Courts of Appeals:

Graver vs Linde, 336 U. S. 271 and (on rehearing) 339 U. S. 605
Hildreth vs Mastoras, 257 U. S. 27
Eibel vs Minnesota, 261 U. S. 45
Smith vs Snow, 294 U. S. 1
Temco vs Apco, 275 U. S. 319, 330
Carnegie vs Cambria, 185 U. S. 403, 437
Webster vs Higgins, 105 U. S. 580
Flexwood Co. vs Faussner, 145 F. 2d 528, 535 (7 Cir.)
Shick vs Dictograph, 89 F. 2d 643, 646 (2 Cir.)
Hawkinson vs Wilcoxen, 149 F. 2d 471, 475 (6 Cir.)
Reynolds vs Whitin, 167 F. 2d 78, 85 (4 Cir.)
National vs A. B. T., 164 F. 2d 333, 339 (7 Cir.)
Lincoln vs Nashua, 157 F. 2d 154, 158 (1 Cir.)
Cleveland vs Bliss, 145 F. 2d 991, 997 (6 Cir.)

1-c. As to the matter of power of the District Court to overrule the jury's fact-finding of invention in an admittedly unanticipated patent (Question 4 above) the decision of the Court of Appeals is in conflict with the decision of the Court of Appeals for the Ninth Circuit in *Cutter Laboratories vs Lyophile-Cryochem Corp.* (179 F. 2d 80).

2. This case is of public importance in its effect upon the law of patents, because by the lower Courts' criterion of invention and of definiteness, few if any patents could be sustained even in scientific fields.

3. While this Court has in the past 20 years passed on a number of patents involving trivial, obvious and readily predictable mechanical changes culminating in this Court's decision in the *A & P case*, which has since been almost universally invoked against every litigated patent (the overwhelming majority * of which have been held invalid thereon), this Court has never applied the tests or criteria of invention as stated in the *A & P case* to any case involving an invention in the field of science, nor to any other case except a case likewise involving a trivial, obvious and readily predictable mechanical change (*Crest vs Trager* 341 U. S. 913). District Courts as well as Courts of Appeal have made widely varying interpretations of this Court's decision in the *A & P case*.

4. In its decision in the case at bar, the Courts below have made an interpretation of this Court's decision in the *A & P case* which petitioner believes was not intended by this Court and under which interpretation few *if any* patents could ever be sustained, even in the scientific and engineering fields, because it rejects as the test of invention the unobviousness to persons skilled in the art, and the scientifically and industrially significant improvement achieved, and instead adopts as the test of invention whether the improvement in the operation of the device is one of degree or

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* a survey indicates that approximately 90% (118 out of 134) of the patents have since been held invalid on the application of the tests of the *A & P case* (the 4th, 5th and 10th Circuits having held a few patents valid as meeting the tests of the *A & P case*)

one of kind;—a test for which there is no warrant either in statute or in this Court's decision in the *A & P case*, and a test under which virtually all patents would be invalid (except the rare patent which represents the threshhold of a new art) because however unobvious and unpredictable was the difference between the prior-art and the patent-in-suit (namely, that the difference would give an improved operational result or functioning), the improvement in the result or operation achieved by the patent-in-suit must virtually always be a matter of degree rather than of kind, since by the very nature of things the prior-art devices within the same class or art always have for their objective an operational-result which is the same in "kind" as that of the patent-in-suit.

5. This case involves important questions of federal law, namely, patent law, which have not been but should be settled by this Court.

Constitutional provisions and Statutes involved

(the below-cited constitutional provisions and statutes are set out, in full, on pages 31 to 38 appended hereto)

Section 8 of Article 1 of the Constitution

Seventh Amendment to the Constitution

The applicable portions of the Patent Laws as enacted and amended up to and including the Act of August 1, 1946:

35 U. S. C. 31 (R. S. 4886) Inventions patentable

35 U. S. C. 33 (R. S. 4888) Application for patent; description; specification and claim

35 U. S. C. 34 (R. S. sections 4889, 4890, 4891) Same; drawings, specimen of ingredients, models

35 U. S. C. 36 (R. S. 4893) Same; examination of invention and issuing of patent

35 U. S. C. 69 (R. S. 4920) Pleadings and proofs in actions for infringement

Applicable portions of Patent Act of 1952; corresponding to the above-cited portions of the prior Patent Acts which it replaced:

35 U. S. C. 101 Inventions patentable
35 U. S. C. 102 Conditions for patentability
35 U. S. C. 103 Conditions for patentability; non-obvious subject matter
35 U. S. C. 112 Specification
35 U. S. C. 113 Drawings
35 U. S. C. 114 Models, specimens
35 U. S. C. 131 Examination of application
35 U. S. C. 282 Presumption of validity; defenses

Statement of the Case

The proceedings, and the issues tried and decided

The Complaint charged respondent with infringement of Fischer patent 2,441,350 (5a) on *Rotameter & Metering Tube Therefor* granted to petitioner (as assignee) on May 11, 1948, on application filed May 15, 1944 by Kermit Fischer.

The case was tried to a jury, but by a stipulation (300a-301a) at the close of the evidence and before the jury was addressed or instructed, the defense of alleged "indefiniteness" of the claims under 35 U. S. C. 33 was reserved for subsequent determination by the Court.

Respondent's accused rotameters and metering-tubes therefor (PXs 3 to 9) being substantially scaled replicas of the rotameter and metering-tube shown in the drawings of the Fischer patent-in-suit, the District Court found infringement to be so clear that it would neither receive testimony to establish it (53a-55a) nor submit it to the jury (300a-301a), and found for plaintiff on infringement (317a/33-4).

The jury rendered a verdict for plaintiff on all issues submitted to it and awarded damages (302a).

The District Court sustained defendant's Motion (302a) for judgment n. o. v. on the sole question whether the admittedly unanticipated subject matter of the Fischer patent represented invention over the prior-art. The Court thought that it did not involve invention (312a/6), notwithstanding that all underlying facts bearing on this issue

it found favorably to plaintiff: facts which under this Court's decisions and the decisions of the Courts of Appeals of other Circuits would require the sustaining of the patent.

On the reserved question of the alleged "indefiniteness" of the claims the Court likewise held for defendant, notwithstanding defendant's stipulation (221a/1-3) that the claims were not readable upon any of the prior art and the Court's finding that they squarely read on the accused devices (317a/32-3).

The patent-in-suit and the art to which it pertains and the Court's finding favorable to petitioner

The Fischer patent-in-suit relates to a class of rate-of-flow meters scientifically termed "variable area meters", though sometimes called "rotameter" because in the original and now largely obsolete forms thereof the movable metering-element was constructed to rotate in the liquid in an effort to center it therein. Rotameters have been extensively used in the chemical and continuous process industries to indicate, record and automatically control critical rates of flow in complex chemical processes.

Rotameters consist of two co-acting and mutually interdependent metering-elements; one being a stationary vertical metering-tube whose internal cross-section increases from bottom to top, and the other being the movable metering-head disposed within said tube and measuring the rate-of-flow of fluid therethrough by its height therein.*

The movable metering-element has commonly been mis-named "float", because it creates the illusion of floating in the vertically-moving column of fluid, whereas it is heav-

* many different cross-sectional forms have been developed in the art, because the form of the cross-section materially affects the fluid-dynamic mechanism (namely, the fluid-dynamic characteristics) of the flow-meter and bears upon range of accuracy, range of viscosity-immunity and flow-range of the rotameter as a whole, and affects the question whether the position of the movable metering-element in the metering-tube will be in linear relation to the rate-of-flow throughout flow-range or whether it will be in some geometric and other more complex mathematical relationship thereto;—the latter affecting possibilities of proper calibration.

ier than the fluid being measured and in reality is sinking through the liquid column at all times.

The rotameter art is a very extensive one, having originated in Germany about a hundred years ago.

It was in quest of achieving greater accuracy, reliability and viscosity-immunity, that Cox, an eminent scientist, researched for twenty-five years; the final fruits of his research being his fluted-tube rotameters shown in his four patents in evidence (DXs 13, 15 & 22 and PX-40), which the Court found was "something entirely different" (316a/3-5) from Fischer's rotameter.

Cox's idea in his aforementioned patents was to prevent the wobbling and chattering of the hard steel metering float against the fragile glass float-guides and to maintain accurate centering of the float requisite for accuracy of measurement, by surrounding and embracing the periphery of the float by four broad concave cylindrical float-guides, to the maximum extent possible, while leaving some of the metering-float clear of the float-guides and while still leaving metering passageways and surfaces between the float-guides, through which the fluid may flow and be metered.

Fischer took a diametrically opposite course. His idea was to reduce the stationary float-guiding surfaces to the very minimum possible within the workability of glass used for the rotameter tubes.*

Fischer went counter to Cox's teachings and theories. Fischer entrusted the accuracy of the rotameter to three sheer point-contacts between stationary float-guides and the float; point-contacts of virtually *zero* area. This is pointed out by both in the specification and claims of the patent-in-suit. He took a long chance that the incessant and rapid vibration of the hard steel float against the glass guides of the metering tube could be overcome by a minimum number

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* The limitation upon how small Fischer's convex line-presenting float-guided beads can be made, from the wall of the glass tube, depends entirely upon the fluidity and moldability of the glass under the heat-and-suction method by which initially the parallel-walled of glass tubes must be collapsed onto the forming-mandrels which contain the grooves to form the float-guides.

of simple point-contacts and that neither the hairline guide of the glass bead nor the thin edge of the float, would be damaged in long and continuous usage, nor even scratched by the vibration of the float.[x]

The rotameter of the patent-in-suit was instantly accepted by the instrumentation engineers in the chemical and process industries and has been extensively used in these industries ever since, in ever increasing numbers and in ever increasing applications. The Court found commercial success (311a/27-9).

Years before and after Fischer invented the rotameter of the patent here in suit and filed his application therefor, respondent's organizer and first president, Stephen A. Brooks, a mature and widely experienced engineer and one highly skilled in the rotameter art, had been petitioner's vice-president, and as such had become intimately familiar with the rotameters of the Cox patents relied upon by defendants, long prior to the filing of the application for the patent-in-suit;—having supervised the manufacture, by petitioner, of the fluted glass metering-tubes for Cox, on mandrels supplied by Cox in accordance with Cox's first-filed patent (DX-13). As petitioner's vice-president, Brooks approved and took part in directing the filing of the application of the Fischer patent-in-suit, and thereafter urged plaintiff's patent-attorney to vigorously prosecute the same;—all notwithstanding his prior familiarity with Cox rotameter.

Directly upon leaving petitioner, Brooks organized respondent and immediately chose to make the rotameter of Fischer's then pending application for the patent-in-suit, in preference to any of the many different kinds of rotameters available in the art including many different kinds commercially produced by others, on which patents had expired.

Immediately upon the issuance of the patent-in-suit

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x In his prior patent (DX-15, at 516a, Column 1, lines 26-29 and Column 2, lines 54 & 55) Cox points out that even microscopic variations in the glass surface will impair the accuracy of the rotameter, and that wobbling impairs accuracy.

petitioner offered to license respondent at a reasonable royalty rate (PX-10, at 377a of *Volume II of Joint Appendix*).

Upon the trial, defendant's witness Diament, another engineer skilled in the rotameter art and a former vice-president of petitioner, testified that the rotameter of the patent-in-suit was "vastly superior" (256a/1-8) to the rotameters of the Cox patents relied on by defendant, and that it had been his judgment that the rotameter of the patent-in-suit was inventive and patentable over the Cox rotameters (253a/18-24) and that he had urged upon petitioner to file a patent-application thereon;—Diament likewise having been intimately familiar with Cox's entire rotameter developed and having personally conducted extensive fluid-dynamic studies on the Cox rotameter years before the birth of the rotameter of the patent-in-suit and the filing of the application therefor.

Cox licensed respondent under the Cox patents (DXs 13, 15 & 22 and PX-40), but nevertheless respondent preferred instead to make the rotameter of the patent-in-suit (Court: 311a/29-33).

Patent Examiners had considered the Cox patents as well as patents from other arts showing relatively narrow line-presenting guides, for guiding floats in a body of liquid.

The only prior patent relied on by respondent, which was not cited by the Examiners in their Official Actions on the Fischer application, was the Feldkamp patent of 1925 (DX-11, 503a) which was for a level-indicating fill-plug for storage battery cells. However, this patent is not anymore relevant than the patents which the Examiners cited, showing other devices which had relatively narrow line-presenting float-guides. Indeed, the Feldkamp patent was not even as relevant as these other patents cited by the Examiners, as for instance, the Wood patent of 1872 (DX-9, 499a) or the Gillum patent (DX-14, 513a), because while in the Wood and Gillum patents on check-valves the velocity of liquid moves a heavier-than-liquid spherical element making point-contacts with convex guides, in the Feldkamp patent, on the other hand, the float is lighter than the liquid

and it rests in a quiescent pool of liquid without any need for rapid change of position nor accuracy of positioning, and serving only to measure of the liquid level and not liquid velocity, movement, volume or rate-of-flow, and having a broad surface contacting the float-guides for a length of about an inch, and hence incapable of making point-contacts with the guides.

Defendant's expert testified that in Feldkamp the liquid-level indicator is loosely guided between three vertical guides *in a slotted cage open on its side throughout its length, which is not a metering-chamber* (202a), and that in Feldkamp the guiding "clearances . . . do not have the same significance as they do in the operation of the flow-meter" of the patent-in-suit (203a/15-7), and that "From an engineering point of view . . . a 10/1000 clearance on the float . . . in the Feldkamp patent would not be critical, whereas, 10/1000 between the float and the bead guides in the rotameter (of the patent-in-suit) would be critical" "Because the float would tend to rattle in the (metering) tube (of the rotameter) and it would no longer be concentric with the axis of the tube" (203a/24-31).

The Court did not regard the convex guide-ribs or guide-beads of Feldkamp as different from the convex guide-ribs or guide-beads of "several other earlier patents" of record (308a/8-10), such Wood (DX-9) and Gillum (DX-14) cited by the Examiners. The only possible reason for defendant's cumulative reliance upon Feldkamp (to show convex guide-ribs) is that it was not cited in the file-wrapper of the patent-in-suit.*

Fischer's invention increased the range of viscosity-immunity and hence the range of accuracy of the rotameter, as the Court found (311a/22-7).

The fluid-dynamic principles and mechanisms which underlie Fischer's rotameter of the patent-in-suit, were

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* no doubt in an attempt to lessen the force of the settled rule of decisional law well stated in *Hunt vs Armour*, 185 F. 2d 722, 726 (7 Cir.) that "The presumption of validity of a patent is greatly strengthened when the principal art relied upon has been considered and rejected by the Patent Office."

fully presented to the Patent Examiners in a written statement (24a-32a) filed prior to the allowance of the patent-in-suit, in which statement he points out not only the differences in physical structure or conformation between Fischer's rotameter and the Cox rotameter but also the difference in the fluid-dynamics underlying them. As one of its pleaded and tried defenses, defendant attacked this statement as misrepresentative, but on the evidence the Court found that this statement was *not* misrepresentative (317a/28-30).

This was not an expected or predictable result and was not foreseen or suggested by the prior-art, and the teaching of the Cox patents is a contra-indication that such result was to be expected from the substitution of relatively narrow convex float-guides presenting sheer lines to a thin-edged float and forming therewith sheer point-contacts.

There was nothing either in any publication nor in the testimony of any witness to suggest that the range of viscosity-immunity and consequent accuracy would logically be expected to increase by replacing Cox's concave cylindrical float-guides with line-presenting narrow convex guide-beads and by bringing the peripheries of both discs of the float to a thin edge (as against the cylindrically peripheried float-discs of Cox) so as to have sheer point-contacts between float and guides.

No published literature on rate-of-flow meters or on fluid dynamics has been unearthed to show any logical or known connection or correlation between Fischer's departure from the prior-art and the improvements in operational results or in function, which the Court found were due to such departure.

There was no testimony that such correlation was ever known, surmised or foreshadowed prior to Fischer's filing date (by any one other than Fischer).

Basis of federal jurisdiction in the court of first instance

This action was authorized by Section 4919 of the Revised Statutes of the United States (35 U. S. C. 67), as

an action for the recovery of damages for the infringement of a patent.

This action being under an Act of Congress relating to patents, Section 1338 of Title 28 of the United States Code gave the District Court exclusive jurisdiction over the subject matter.

ARGUMENT

Point 1: Relating to Questions 1-4

On the question of invention, the decision of the Court of Appeals is in conflict, in principle, with the decisions (page 7, supra) of this Court and of other courts of appeal of other Circuits which have interpreted this Court's decision in the *A & P vs Supermarket* case (340 U. S. 154).

The Court's findings show that the patent-in-suit meets the classic tests of invention.

Thus, the Court found that "Cox's conception of flutes or ribs for his tubes was something entirely different" from the conception involved in the rotameter of the patent-in-suit (316/3-5), and that Cox's rotameters "do not embody the concept described in the patent (in suit), and . . . they cannot be asserted against the validity of the patent" (317a/24-7), and that "Fischer's greater range of viscosity-immunity gives his instrument a very considerable advantge as an article of ordinary industrial use" (311a/24-7), "is easier and simpler to make than the Cox tube" (309a/14-5), and that "the longer range of Fischer no doubt made his rotameter more satisfactory industrially" (312a/22-4) and that Fischer "made a somewhat better and more saleable instrument for industrial use", and that "the Fischer rotameter has had a substantial degree of commercial success", (in a scientific field not subject to emotional sales-appeal), and that "the defendant, though licensed under the Cox patent chose to court an infringement suit by making and selling the device of the patent (in suit) in preference to any other" (311a/26-33).

The decision of the Court of Appeals adopts a test of

invention not authorized by statute or by any decision of this Court;—a test which few if any patents can likely meet, namely:

> that an admittedly unanticipated patent which meets all the classic tests of invention established by the decisions of this Court, including the test of unobviousness now codified in the Patent Act of 1952, is nevertheless invalid if the operational-result or functioning achieved by the invention is *only better* than that achieved by the prior-art, namely, if such operational-result or functioning of the new device represents a difference of *degree* rather than of *kind* in respect to the operational-result or functioning of the prior-art device.

The Court of Appeals has misinterpreted and misapplied this Court's decision in the *A & P case, supra*, in interpreting the term "combination patent" to mean any patent for an invention consisting of two or more elements; —even though those elements be integral with each other (as for instance in the elements of the metering tube of Claim 1 of the patent-in-suit), and irrespective of whether the several elements of the claimed invention are so interdependent that the improved result found to flow from the invention was unpredictable by those skilled in the art.

Well nigh a 100% of all patents are "combination" patents or "an assembly of elements" in the sense in which the Court of Appeals has applied the term "combination" and "an assembly", in the case at bar.

We believe and respectfully submit that the term "combination", when intended to impugn patentability, means that the functions of the several elements are so apparent and the result of their conjoint use so obvious and necessarily or readily predictable, and that whatever improvement or betterment flows from their conjoint use is only the obvious and predictable betterment which would be readily apparent from the mere familiarity with the elements, separately, uncombined.

It is on this basis that this Court in *Bassick vs Hollingshead* and *Rogers vs Alemite* (298 U. S. 415) and in

Lincoln vs Stewart-Warner (303 U. S. 545) held invalid the "combination" of grease-pump, hose, coupler and grease-cup.

It is believed that it is in this sense that this Court used these terms in its decision in the *A & P vs Supermarket* case, supra.

Of course, the placing of a three-sided frame on a cashier's counter is a "combination" or "assembly" of elements in the sense impugning validity, because the advantages or improvements which may flow from such a "combination" or "assembly" of elements are obviously predictable and not in the slightest unexpected.

So in the *Bassick* and *Rogers* cases, just above referred to, substituting the better hose-coupler of one prior-art patent in place of the less effective hose-coupler of another prior-art patent between an old grease-pump-and-hose and an old grease-receiving-cup, cannot produce any unobvious or unexpected result, however better the result may be, because the result of the better coupler would be readily foreseeable from a mere familiarity with the two prior-art couplers, one of which was substituted for the other in the old "combination" of pump, hose, coupler and grease-cup.

However, in the case at bar, there was no known correlation between (a) the shape and size (small convex line-presenting) of the float-guides and (b) the shape of the (thin line-presenting) edges of the float-discs and (c) the range of viscosity-immunity of a variable-area type flowmeter;—and the prior flowmeter patents and the patentee thereof (relied on by the defendant) all showed that the direction taken by the patent-in-suit was contra-indicated by the thoughts, theories, surmises, experience and practices of the prior-art workers.

If this be a "combination" or "assembly" of elements impugning patentability, notwithstanding the integrality of all elements of Claim 1 of the patent-in-suit and the fluid-dynamic complex and difficult-to-analyze interdependence of all elements of Claims 2 and 3 of the patent-in-suit, and notwithstanding the unobviousness of the significant improvement found to flow therefrom, and if the fact that the

improved operational-results or functioning is one of degree, *ipso facto* negatives invention notwithstanding the fact that the device meets the classic tests of invention, then under the criteria set by the decision of the Court of Appeals (and that of the District Court which it affirms) no patent that is ever likely to be litigated can be held valid.

Point 2: Relating to Questions 5 & 6

On the matter of the alleged "indefiniteness" of the claims, the decision of the Court of Appeals (and that of the District Court which it affirms) is in direct conflict with the decisions of this Court and other courts of appeals cited on page 7, supra, and would establish a precedent which in and of itself would render invalid a large proportion of all mechanical and electrical patents, because of the wide-spread use, in patent-claims, of the word "plurality" and of relative terms such as "thin", "narrow', "small" or "relatively thin", "relatively narrow" or "relatively small", which terms have been approved by the aforesaid decisions.

The defendant having stipulated and the Court having found that the claims are *not* readable on any item of prior-art and the Court having found that the claims are fully readable on defendant's accused devices, and the Court having found that the prior-art "is something entirely different" from the device of the patent-in-suit and that the prior-art does "not embody the concept described in the patent" in suit, it follows that, on the face of the matter, the claims do draw a line of demarcation between the prior-art structure and the invention of the patent-in-suit, satisfying the requirements of 35 U. S. C. 33 and the 35 U. S. C. 112 of the Patent Act of 1952.

Defendant called four men skilled in the rotameter art, namely, Cox, Friedli, Diament and Brooks. Not one of them said or suggested that he or any other man skilled in the art would have any difficulty knowing just what the rotameter is which is intended to be comprehended by the claims of the patent-in-suit, in the light of its drawings, specification and the prior-art and contemporaneous patents

cited in the patent-in-suit and whose teachings are included therein by reference.

A comparison of the portions of the circumference available for flow-metering-passage in Cox's 1942-filed patent (DX-13, at 580a) and in the Fischer patent-in-suit, shows that

(a) at the outer diameter (or at the diameter of the tapered surface) Cox has 32% and Fischer 75% available for flow-metering-passage at the top of the tube, while at a point near the bottom (but still somewhat above the bottom) of the tube, Cox has 42% and Fischer has 92% of the circumference available for flow-metering-passage (Fischer's beads vanishing to *zero* and his flow-metering-passage increasing to 100% of the circumferential dimension even at the outer diameter, at the lower end of the metering length of the tube);—and

(b) at the inner or float-diameter Cox has approximately 45% avialable for flow-metering-passage throughout the length of the tube (and 55% is occupied by concave cylindrical float-guides) while Fischer has virtually 100% available for flow-metering-passage (and 0% is occupied by convex line-presenting float-guides).

Cox's proportions are of substantially the same order in his second patent filed September 13, 1943 (DX-22, at 558a).

In Cox's third patent filed October 29, 1943 (DX-15, at 515a) this ratio, which in turn affects the important ratio of float-diameter to taper-diameter (207a-208a), becomes still less favorable in Cox because in this later patent he further widens the float-guides and narrows the flutes in an effort to keep the float from chattering;—the Cox's four flutes (combined) here occupying only approximately 27% and his guides 73% of the circumference of the bore, i.e., *at the float-diameter*, throughout the length of the tube, while at the outer diameter, i.e., at the tapered inner surface of his flutes, his four flutes (combined)

occupy approximately 22% and his four "ribs" or guides occupy 78% of the circumference.

> (1) Thus, whether comparing Fischer's three float-guides with Cox's four float-guides at the float-diameter, where Fischer's three guides occupy 0% and the four guides of Cox's first patent (DX-13) occupy 55% and of his third patent (DX-15) occupy 72% of the float-circumference, or
>
> (2) whether contrasting Fischer's three beads with Cox's four ribs at the so-called base-diameter or outer diameter, wherein Fischer's three beads occupy 25% of the circumference at the top of the tube and 0% at the bottom of the tube, and where the four ribs occupy 68% at the top of the tube and about 58% at the bottom of the tube in the first Cox patent (DX-13) and occupy 78% of the circumference two-thirds of the way up the tube in the third Cox patent (DX-15),

the phrase, "a relatively small circumferential dimension" in the claims of the patent-in-suit is a perfectly clear statement from which any man skilled in the art can understand that Fischer intended that his beads be as few and as small as possible.

The sole basis of the lower Courts' decision of invalidity for supposed indefiniteness of claims is that, if the *number* of the guide-beads of the patent are unduly increased within the term "plurality" used in the claims (though such increase would clearly be contrary to the direction pointed by the drawings and specification), or if the beads were made substantially larger than shown in the drawings, *in relation to the tube-size* (and such enlargement would likewise be contrary to the direction pointed by the specification and drawings and "the context of the art itself"), then the advantages flowing from the patented device would be lost; the Court reasoning that the patent does not show the extent of deviation or departure from it which should be regarded as outside the scope of its claims. *No mechanical patent ever does.*

The Court was seemingly of the view that the claim should perhaps have stated that the *number* of beads is *three* (as shown in drawings) and perhaps that *in addition* to showing in the drawings the proportion of bead-size to tube-size by which the words "relatively small" are graphically illustrated in relation to the Fischer tube and in clear contrast to the Cox tube, the proportion of bead-size to tube-size shown in the drawings should also have been set out in words in the claims.

The wide use of the term "plurality" and of such relative terms as "small", "thin" or "relatively small" or "relatively thin", is indicated by the Cox patents of record which use "plurality" in the claims thereof referenced below*, as well as by many other patents in the flow-meter art using "plurality", "relatively small", etc., in the claims thereof, which patents are identified on pages 39 and 40 following this petition, which list has been made as a result of a survey by petitioner.

The use of the word "plurality" in mechanical patents has been approved by this Court in *Hildreth vs Mastoras*, 257 U. S. 27 and in many other cases.

There is not a single reported decision in which the claim of a mechanical patent was held fatally indefinite because of the use of the word "plurality" therein.

Such terms as "small," "high" and "thin" have been approved in mechanical cases and have been held *not* indefinite under 35 U. S. C. 33 by the decisions of this Court and of other courts of appeals and other courts: *Eibel vs Minnesota*, 261 U. S. 45, 65; *Flexwood vs Faussner*, 145 F. 2d 528, 535 (7 Cir.); *Schick vs Dictograph*, 89 F. 2d 643, 646 (2 Cir.); *Lee vs Congress*, 48 F. Supp. 827, 831 (DC Mass); *Application of Frederick*, 175 F. 2d 462 (CCPA); *Hewes vs Meyerson*, 51 F. 2d 405, 406 (DC SD NY); *Salvage Process Co. vs James Shewan*, 26 F. 2d 258,

* Cox 2,384,800 (DX-13, 508a) used the word "plurality" in each of Claims 2, 3 and 4 at 512a. Cox 2,389,957 (DX-22, 558a) uses "plurality" in each of Claims 1, 4, 5, 6, 7 and 9 at 564a-566a. Cox 2,417,532 (PX-40, 408a) uses "plurality" in Claims 1, 2, 4, 5, 6, 9 and 10 at 513a-514a. Cox 2,604,784 (PX-62, 416a) uses "plurality" in each of Claims 1 to 7, at 431a.

260 (DC ED NY); *Wheeler vs Rinelli*, 295 Fed. 717, 726 (DC ED NY); *Ex parte Clizbe*, 36 PQ 299, 300.

> *Eibel vs Minnesota* (261 U. S. 45, 65-6):
> "Expressions quite as indefinite as 'high' and 'substantial', in describing an invention or discovery in patent specifications and claims, have been recognized by this court as sufficient." (citing authorities)
>
> *Flexwood Co. vs Faussner & Co.* (145 F. 2d 528, 535):
> "The word 'small' might without the context be considered indefinite and to lack particularity and distinctness, but, in the light of . . . the specifications . . . can not, in our opinion, properly be subjected to that criticism."

Citing and relying on this Court's decision in *Smith vs Snow* (294 U. S. 1), the Court in *Schick vs Dictograph*, 89 F. 2d 643, 646 (2 Cir.) held that such terms as "thin" are not indefinite in a mechanical case:

> "Claim 1 calls for extreme thinness in the shear plate without otherwise defining more definitely the degree of thinness. But that is not fatal. The claim is to be read in connection with the disclosure of the specifications and given of permissible meanings the one which will fairly and reasonably be supported both by the language used and by the scope of the actual invention disclosed. *Smith vs. Snow*, 294 U. S. 1; *Keystone Mfg. Co. v. Adams*, 151 U. S. 139. So this claim is to be read to mean thinness of shear plate sufficient to provide the desired closeness of shave and the support from flexing to whatever extent such thinness requires."

We believe that the Court of Appeals also mistakenly applied to the case at bar the test of definiteness in *G. E. vs Wabash* (304 U. S. 364); *United vs Binney* (317 U. S. 228); *Corona vs Donovan* (276 U. S. 358) and *Incandescent Lamp Case* (159 U. S. 465) which is applicable to chemical patents and "materials" patents and composition-of-matter patents but is inapplicable to a mechanical patent

fully illustrated by scaled drawings, such as the patent here in suit;—particularly where, as here, the patent-claims draw a clear line of demarkation between the prior-art on the one hand and the patentee's invention and the accused device on the other hand.

The possible confusion between (a) definiteness and (b) scope or breadth of claim;—as well as the inapplicability to mechanical patents of the test of definiteness applicable to chemical and composition-of-*matter* or "materials" patents, is well pointed up in *Ex parte Branham* (67 PQ. 52, 53), wherein the Board of Appeals said:

> "Examiner has rejected claim 12 on the ground that it is vague and indefinite and too broad, and proposes to read it upon some circuits which he has embodied in diagrammatic form in his answer. It seems to us that this ground of rejection and discussion cannot be approved. This is a mechanical case and it has been held that the doctrine of rejecting claims because of being broader than the disclosure does not apply to mechanical cases but only to chemical cases. It is considered that electrical circuits come under the principle of and classification of mechanical cases rather than chemical cases in respect to this rule."
>
> "It is our view that the Examiner's holding that the claim is vague and indefinite because of his contention that it reads on other devices, *wihch he can imagine,* relates merely to the matter of the scope of the claim. As pointed out above we see nothing vague and indefinite in the claim, and find *no objection in the fact that it may read on other imaginary devices.* It is also held that a claim directed to this mechanical device may be drawn as broadly as permitted by the prior art. The above propositions are believed supported by *In re Vickers et al.*, 141 F. 2d 522 (C. C. P. A.) and decisions cited therein."

The distinction between *Eibel vs Minnesota*, supra, applicable to mechanical patents in which the claimed subject matter is fully shown in detail in the drawings, and

United vs Binney (317 U. S. 22) and *G. E. vs Wabash* (304 U. S. 364) applicable to patents in which the claimed matter is not shown in any drawings and which are not in reality mechanical patents but rather *"composition of matter"* patents, is, we believe, well pointed out in *Lee vs Congress*, 42 F. Supp. 827, 831 (DC Mass);—holding that "small quantity" and "moderate and sustained heat" in the claims, were sufficiently definite to satisfy the requirements of 35 U. S. C. 33, in reliance, inter alia, upon *Eibel vs Minnesota*, supra.

The Patent Act of 1952 also codifies, and so approves, the long-established rule of decisional law that a patent-claim shall not be held invalid because of the inclusion therein of even the most indefinite of all bits of claim-language widely used, namely, the term "means", if the specification and drawings clearly show the "means" intended, but that such otherwise indefinite and all-embracing term shall instead be construed to cover what is disclosed in the specification and drawings "and *equivalents thereof*" (35 U. S. C. 112).

It follows that such terms as "plurality" and "relatively small" are not fatally indefinite under either the old statute (35 U. S. C. 33) and the decisional-law interpreting it, or under the Patent Act of 1952 which codifies the decisional law;—particularly where, as here, (1) the patent shows and says that *three* is the preferred "plurality" intended, and (2) the patent contains a drawing scaled to the commercial product showing just what is meant by "relatively small", and (3) defendant's device is a proportionally exact counterpart of the drawing, and (4) the specification and claims indicate that the convex guide-beads should be as few (i.e. 3) and as small as possible.

Hawkinson vs Wilcoxen, 149 F. 2d 471, 475 (6 Cir.):

> "In determining the sufficiency of these patents, the real test is, whether the disclosures in the specification *and claims* make the inventions clear to *a mechanic skilled in the art* of tire retreading so that he could construct the apparatus and practice the method. *Eibel Co. v. Paper Co.*, 261 U. S. 45, 65."

The following cases hold that the claims are to be interpreted in the light of the specification and drawings and that the claims are not "indefinite" if their meaning can fairly be gleaned from the specification and drawings:

Eibel vs. Minnesota, 261 U. S. 45, 65;
Smith vs. Snow, 294 U. S. 1, 11;
Temco vs. Apco, 275 U. S. 319, 330;
Carnegie vs. Cambria, 185 U. S. 403, 437;
Webster vs. Higgins, 105 U. S. 580;
Reynolds vs. Whitin, 167 F. 2d 78, 85 (Cir. 4);
National vs. A. B. T., 164 F. 2d 333, 339 (Cir. 7);
Lincoln vs. Nashua, 157 F. 2d 154, 158 (Cir. 1);
Cleveland vs. Bliss, 145 F. 2d 991, 997 (Cir. 6);
Flexwood vs. Faussner, 145 F. 2d 525, 535 (Cir. 7)

35 U. S. C. 34 expressly makes the *drawings "a part of the specification"*.

As pointed out by this Court in *Smith vs Snow* (294 U. S. 1, at 11), "while the claims of a patent may incorporate the specifications or drawings by reference, see *Snow vs Lake Shore R. R.*, 121 U. S. 617, 630, and thus limit the patent to the form described in the specifications, *it is not necessary to embrace in the claims or describe in the specifications all possible forms in which the claimed principle may be reduced to practice.* It is enough that the principle claimed is exemplified by a written description of it and of the manner of using it 'in such full, clear, concise and exact terms' as will enable one 'skilled in the art to make, construct, compound and use the same'."

The lower Courts' standard of definiteness in this case is without precedent; being unlike the test adopted by this Court and by other Courts of Appeals in *any* mechanical patent case illustrated by drawings;—and is in conflict with such decisions cited under *Reason 1-b* on page 7, supra.

In every reported case raising and deciding the question of definiteness of a claim under 35 U. S. C. 33 in respect to a mechanical patent illustrated by drawings showing a specific embodiment of the structure upon which

the claim was clearly readable, the matter of definiteness was tested by whether or not the claim was fairly or plainly (or only dubiously or doubtfully) readable on the prior patent or on the accused device.*

The Court's ruling on "definiteness" in this case would nullify the *law of equivalents* now codified in the Act of 1952 (35 U. S. C. 112) and would render mechanical patents worthless by requiring their claims positively to exclude, *a priori*, all hypothetical future variants and modifications of and all hypothetical deviations and departures from the thing shown and described in the patent (which any defendant may conjure up in his imagination;—while following the patent exactly).

This has never been the law of mechanical patents (*Smith vs Snow*, supra).

The test of definiteness applied by the Courts below is one which would inevitably eliminate all possible reliance on the doctrine of equivalence.

In well over 50% of all infringement-suits the question is presented whether defendant's device or practice, *which is generally somewhat different from the device or practice shown in the drawings of the patent-in-suit*, is within or without the claims thereof, because in virtually *all* mechanical patents (and in most other patents) the claims comprehend not only the specific structure shown in the drawings but also a greater or lesser range of modifications or variations thereof, and it is up to the courts to decide whether such modification, variation or departure is within or without the scope of the claim; i.e., whether it is an "*equivalent*", and hence an infringement.

What the Court of Appeals has done in the case at bar is to decide a question not presented by any issue in this case, namely, how much of a future deviation or departure from the structure precisely shown in the drawing

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* With the possible exception of *Haliburton vs Walker* (329 U. S. 1) where the claim was tested against the accused device in order to reach the decision that it was fatally indefinite because the use of the word "means" at the point of novelty made the claim functional and hence readable on the *essentially different* "means" of the accused device.

and described in the specification but yet comprehended by term "plurality" and by the term "a relatively small circumferential dimension" in the claims, should be held to be within the scope of the patent and what future deviation or departure should be held to be without the scope of the patent; such deviations or departures being contra-indicated both by the patent itself as well as *"the context of the art itself"* as gleaned by "a person skilled in the art" (United vs Binney, 317 U. S. 228, at 233).

The decision of the Court of Appeals in this case on the question of definiteness is in conflict with this Court's decisions in *Graver vs Linde*, 336 U. S. 271 and 339 U. S. 605 on the important judicial doctrine of *equivalence*, and with the decisions of Courts of Appeals of other circuits on this doctrine, and the decision of the Court of Appeals in this case would completely nullify the whole doctrine of *equivalence* by invalidating on the ground of indefiniteness any claim which standing alone and without reference to the specification and drawing, does not preclude all possible future questions of *equivalence* in respect to yet unborn devices.

Summary

In conclusion petitioner respectfully submits that this case is one well justifying the grant of a writ of certiorari to resolve important questions of patent law and the conflicts between the decision of the Court of Appeals in this case and the decisions of this Court and of Courts of Appeals of other Circuits on the important questions of patent law, namely:

1. Whether the test of patentable invention under 35 U. S. C. 31 is
   a. unobviousness to those skilled in the art, as this Court has held and has been held by the Courts of Appeals of other Circuits, and as now codified in the Patent Act of 1952 (35 U. S. C. 103),

      or

   b. whether the improvement in operational-results or functioning of the device is one of degree or one of kind.

2. Whether the test of definiteness under 35 U. S. C. 33 is
   a. whether the claim distinguishes what the patentee "claims as is invention" from the prior-art "so as to enable any person skilled in art . . . to make" the device which is the claimed invention (as distinguished from the device of the prior-art), as the Statute provides and as has been held by this Court and by the Courts of Appeals of other Circuits, and as codified in the Patent Act of 1952 (35 U. S. C. 112)

   or

   b. whether the claim standing alone *and without reference to the specification and drawings* precludes all possible future questions of "equivalence" in respect to yet unborn devices, namely, the extent or degree of some future departure (from the clear directions of the specification and drawings) which should in some future suit (with unknown parties) be deemed a legal equivalent of the claimed invention and what degree or extent or departure should not;—so as to make it unnecessary and impossible ever to invoke the established judicial doctrine of "equivalence" which has been codified in the Patent Act of 1952 (35 U. S. C. 112).
3. Whether under Rule 50-b the Court may set aside a jury's verdict (finding invention in the patent) on the ground that the improvement achieved by the patent-in-suit was in the degree rather than in the kind of operational-result or functioning;—where the invention is admittedly unanticipated and meets all the judicially recognized tests of invention including that of unobviousness to persons skilled in the art that the physical differences over the prior-art could or would produce the improved operational-results or functioning as well as the unobviousness of the physical difference itself.

It is respectfully submitted that these questions are important questions of public interest.

Respectfully submitted,

LEONARD L. KALISH
attorney for petitioner

Constitutional Provisions and Statutes Involved

Section 8 of Article 1 of Constitution

The Congress shall have power . . . To promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries.

The Seventh Amendment to the Constitution

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

The applicable portions of the Patent Laws as enacted and amended up to and including the Act of August 1, 1946

35 U.S.C. 31 (R.S. 4886) Inventions patentable

Any person who has invented or discovered any new and useful art, machine, manufacture, or composition of matter, or any new and useful improvements thereof, or who has invented or discovered and asexually reproduced any distinct and new variety of plant, other than a tuber-propagated plant, not known or used by others in this country, before his invention or discovery thereof, and not patented or described in any printed publication in this or any foreign country, before his invention or discovery thereof, or more than one year prior to his application, and not in public use or on sale in this country for more than one year prior to his application, unless the same is proved to have been abandoned, may, upon payment of the fees required by law, and other due proceeding had, obtain a patent therefor. (R. S. sec. 4886; Mar. 3, 1897, ch. 391, sec. 1, 29 Stat. 692; May 23, 1930, ch. 312, sec. 1, 46 Stat. 376; Aug. 5, 1939, ch. 450, sec. 1, 53 Stat. 1212.)

35 U.S.C. 33 (R.S. 4888) Application for patent; description; specification and claim

Before any inventor or discoverer shall receive a patent for his invention or discovery he shall make application therefor, in writing, to the Commissioner of Patents, and shall file in the Patent Office a written description of the same, and of the manner and process of making, constructing, compounding, and using it, in such full, clear, concise, and exact terms as to enable any person skilled in the art or science to which it appertains, or with which it is most nearly connected, to make, construct, compound, and use the same; and in case of a machine, he shall explain the principle thereof, and the best mode in which he has contemplated applying that principle, so as to distinguish it from other inventions; and he shall particularly point out and distinctly claim the part, improvement, or combination which he claims as his invention or discovery. The specification and claim shall be signed by the inventor. No plant patent shall be declared invalid on the ground of noncompliance with this section if the description is made as complete as is reasonably possible. (R. S. sec. 4888; Mar. 3, 1915, ch. 94, sec. 1, 38 Stat. 958; May 23, 1930, ch. 312, sec. 2, 46 Stat. 376.)

35 U.S.C. 34 (R.S. 4889, 4890, 4891). Same; drawings, specimen of ingredients, models

When the nature of the case admits of drawings, the applicant shall furnish one copy signed by the inventor or his attorney in fact, which shall be filed in the Patent Office; and a copy of the drawing to be furnished by the Patent Office, shall be attached to the patent as a part of the specification. When the invention or discovery is of a composition of matter, the applicant, if required by the commissioner, shall furnish specimens of ingredients and of the composition, sufficient in quantity for the purpose of experiment. In all cases which admit of representation

by model, the applicant, if required by the commissioner, shall furnish a model of convenient size to exhibit advantageously the several parts of his invention or discovery. (R. S. secs. 4889, 4890, 4891; Mar. 3, 1915, ch. 94, sec. 2, 38 Stat. 959.)

35 U.S.C. 36 (R.S. 4893) Same; examination of invention and issuing of patent

On the filing of any such application and the payment of the fees required by law, the Commissioner of Patents shall cause an examination to be made of the alleged new invention or discovery; and, if on such examination it shall appear that the claimant is justly entitled to a patent under the law, and that the same is sufficiently useful and important, the commissioner shall issue a patent therefor. (R. S. Sec. 4893.)

35 U.S.C. 69 (R.S. 4920) Pleading and proof in actions for infringement

In any action for infringement the defendant may plead the general issue, and, having given notice in writing to the plaintiff or his attorney thirty days before, may prove on trial any one or more of the following special matters:

First. That for the purpose of deceiving the public the description and specification filed by the patentee in the Patent Office was made to contain less than the whole truth relative to his invention or discovery, or more than is necessary to produce the desired effect; or,

Second. That he had surreptitiously or unjustly obtained the patent for that which was in fact invented by another, who was using reasonable diligence in adapting and perfecting the same; or,

Third. That it has been patented or described in some printed publication prior to his supposed invention or discovery thereof, or more than one year prior to his application for a patent therefor; or,

Fourth. That he was not the original and first inven-

tor or discoverer of any material and substantial part of the thing patented; or,

Fifth. That it had been in public use or on sale in this country for more than one year before his application for a patent, or had been abandoned to the public.

And in notices as to proof of previous invention, knowledge, or use of the thing patented, the defendant shall state the names of the patentees and the dates of their patents, and when granted, and the names and residences of the persons alleged to have invented or to have had the prior knowledge of the thing patented, and where and by whom it had been used; and if any one or more of the special matters alleged shall be found for the defendant, judgment shall be rendered for him with costs. And the like defenses may be pleaded in any suit in equity for relief against an alleged infringement; and proofs of the same may be given upon like notice in the answer of the defendant, and with the like effect. (R. S. sec. 4920; Mar. 3, 1897, ch. 391, sec. 2, 29 Stat. 692; Aug. 5, 1939, ch. 450, sec. 1, 53 Stat. 1212.)

Applicable portions of Patent Act of 1952 corresponding to the above portions of the prior Patent Acts which it replaced

35 U.S.C. 101 Inventions patentable

Whoever invents or discovers any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof, may obtain a patent therefor, subject to the conditions and requirements of this title. (R. S. 4886; 35 U. S. C., 1946 ed., 31.)

35 U.S.C. 102 Conditions for patentability; novelty and loss of right to patent

A person shall be entitled to a patent unless—

(a) the invention was known or used by others in this country, or patented or described in a printed publication

in this or a foreign country, before the invention thereof by the applicant for patent, or

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of the application for patent in the United States, or

(c) he has abandoned the invention, or

(d) the invention was first patented or caused to be patented by the applicant or his legal representatives or assigns in a foreign country prior to the date of the application for patent in this country on an application filed more than twelve months before the filing of the application in the United States, or

(e) the invention was described in a patent granted on an application for patent by another filed in the United States before the invention thereof by the applicant for patent, or

(f) he did not himself invent the subject matter sought to be patented, or

(g) before the applicant's invention thereof the invention was made in this country by another who had not abandoned, suppressed, or concealed it. In determining priority of invention there shall be considered not only the respective dates of conception and reduction to practice of the invention, but also the reasonable diligence of one who was first to conceive and last to reduce to practice, from a time prior to conception by the other. (R. S. 4886, 4887, 4923; 35 U. S. C., 1946 ed., 31, 32, 72.)

35 U.S.C. 103 Conditions for patentability; non-obvious subject matter

A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that

the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negatived by the manner in which the invention was made.

35 U.S.C. 112 Specification

The specification shall contain a written description of the invention, and of the manner and process of making and using it, in such full, clear, concise, and exact terms as to enable any person skilled in the art to which it pertains, or with which it is most nearly connected, to make and use the same, and shall set forth the best mode contemplated by the inventor of carrying out his invention.

The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.

An element in a claim for a combination may be expressed as a means or step for performing a specified function without the recital of structure, material, or acts in support thereof, and such claim shall be construed to cover the corresponding structure, material, or acts described in the specification and equivalents thereof. (R. S. 4888; 35 U. S. C., 1946 ed., 33.)

35 U.S.C. 113 Drawings

When the nature of the case admits, the applicant shall furnish a drawing. (R. S. 4889; 35 U. S. C., 1946 ed., 34.)

35 U.S.C. 114 Models, specimens

The Commissioner may require the applicant to furnish a model of convenient size to exhibit advantageously the several parts of his invention.

When the invention relates to a composition of matter, the Commissioner may require the applicant to furnish

specimens or ingredients for the purpose of inspection or experiment. (R. S. 4890, 4891; 35 U. S. C., 1946 ed., 34, R. S. 4930, 35 U. S. C., 1946 ed., 76.)

35 U.S.C. 131 Examination of application

The Commissioner shall cause an examination to be made of the application and the alleged new invention; and if on such examination it appears that the applicant is entitled to a patent under the law, the Commissioner shall issue a patent therefor. (R. S. 4893; 35 U. S. C., 1946 ed., 36.)

35 U.S.C. 282 Presumption of validity; defenses

A patent shall be presumed valid. The burden of establishing invalidity of a patent shall rest on a party asserting it.

The following shall be defenses in any action involving the validity or infringement of a patent and shall be pleaded:

(1) Noninfringement, absence of liability for infringement, or unenforceability.

(2) Invalidity of the patent or any claim in suit on any ground specified in part II of this title as a condition for patentability.

(3) Invalidity of the patent or any claim in suit for failure to comply with any requirement of sections 112 or 251 of this title,

(4) Any other fact or act made a defense by this title.

In actions involving the validity or infringement of a patent the party asserting invalidity or noninfringement shall give notice in the pleadings or otherwise in writing to the adverse party at least thirty days before the trial, of the country, number, date, and name of the patentee of any patent, the title, date, and page numbers of any publication to be relied upon as anticipation of the patent in suit or, except in actions in the United States Court of

Claims, as showing the state of the art, and the name and address of any person who may be relied upon as the prior inventor or as having prior knowledge of or as having previously used or offered for sale the invention of the patent in suit. In the absence of such notice proof of the said matters may not be made at the trial except on such terms as the court requires. (R. S. 4920; 35 U. S. C., 1946 ed., 69.)

Other patents in the Flow-meter art in which the term "plurality" as well as comparative terms such as "relatively thin" are used in the claims.

Sherwood, No. 1,889,705 of November 29, 1932, on Flow Meter, uses "plurality" in Claim 2, and "relatively thin" in Claim 3

Schweitzer, No. 1,947,923 of February 20, 1934, on Device for Measuring the Ratio of the Ingredients in a Mixture of Gases or Liquids (assigned to I. G. Farben) uses "little smaller" in Claims 1 & 2

Connell, No. 1,965,333 of March 3, 1934, on Flow Gauge, uses "plurality" in Claims 3, 4, 5, 6, 7, 8, 9 and "relatively angular" in Claim 4

Schweitzer, No. 2,003,474 of June 4, 1935, on Fluid Flow Meter (assigned to I. G. Farben) uses "little smaller" in Claims 1 & 2

Deming, No. 2,023,008 of December 3, 1935, on Regulating and Metering Apparatus (assigned to Air Reduction Co.) uses "extremely small radial dimension" in Claim 8

Fisher, No. 2,052.022 of August 25, 1936, on Flow Meter (assigned to Brown Instrument Co.) uses "flow is relatively small" in Claim 14

Henszey, No. 2,069,309 of February 2, 1937, on Flow Indicator, uses "relatively lighter" in Claim 1

O'Neill, No. 2,203,577 of June 4, 1940, on Means for Measuring and Controlling Fluid Pressures (assigned to Mordica O. Johnston) uses "relatively small" in Claims 4, 5, 6, 7 & 8

Humphrey, No. 2,210,081 of August 6, 1940, on Fluid Flow Meter, uses "relatively small bore" in Claims 2, 3 & 4

Larner, No. 2,262,807 of November 18, 1941, on Flow Meter, uses "plurality" in Claims 2, 4 & 6 and "substantially cylindrical" in Claim 7

Krueger, No. 2,293,987 of August 25, 1942, on Flow Meter (assigned to Badger Meter Co.) uses "relatively large diametered portion" in Claim 1

Ewart, No. 2,303,532 of December 1, 1942, on Flow Testing Device (assigned to Carter Carburetor Corp.) uses "comparatively small cross-sectional area" in Claim 8

Hayward, No. 2,390,252 of December 4, 1945, on Apparatus for Determining Permeabilities of Porous Media, uses "plurality" in Claim 2

Chandler, No. 2,393,144 of January 15, 1946, on Carburetor (assigned to Chandler-Evans Corp.) uses "plurality" in Claim 1

Elowson, No. 2,400,108 of May 14, 1946, on Wide Range Flow Meter (assigned to Pittsburgh Equitable Meter Co.) uses "relatively large variable flow" in Claim 8

Allison, No. 2,402,585 of June 25, 1946, on Fluid Meter, uses "orifice being of substantially smaller size than" in Claim 11

Hulsberg, No. 2,413,352 of December 31, 1946, on Flowmeter (assigned to Universal Oil Prod. Co.) uses "spherical member . . . of substantially smaller diameter than" in Claims 1, 2, 3, 4, 5, & 6

Eitzen, No. 2,431,378 of November 25, 1947 on Viscosimeter (assigned to Schwaderer & Eitzen) uses "plurality" in Claim 2

Dickey, No. 2,459,689 of January 18, 1949 on Fluid Rate of Flow Measuring Apparatus (assigned to Bailey Meter Co.) uses "plurality" in Claims 1, 2 & 3

Eckman, No. 2,606,445 of August 12, 1952 on Fluid Flow Measuring Apparatus (assigned to Minneapolis-Honeywell) uses "relatively minute" in Claims 1 & 4

Hill, No. 2,654,245 of October 6, 1953 on Gasoline Flowmeter, uses "plurality" in Claim 1

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BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED.

Respondent does not contest the general applicability of the Constitutional provisions and portions of the Patent Statutes, revised as of August 1, 1946, as enumerated on page 9 of the Petition. **However, the portions of the Patent Act of 1952, as enumerated on page 10 of the Petition, are completely inapplicable to the present case.**

The Patent Act of 1952 did not become effective until January 1, 1953.[1] This case was tried in February and March of 1952 and was decided by the written Opinion of the District Court which was filed on September 8, 1952. Neither that Opinion nor the decisional grounds set forth therein have been modified or altered in any way, either prior or subsequent to the entry of the Judgment.

As the case was tried and decided under Patent Statutes which have been repealed and superseded by the Patent Statutes now in effect, Certiorari may properly be denied on the ground that the decisions below are of no general interest or import.

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1. "Sec. 4(a). This Act shall take effect on January 1, 1953 . . .

* * *

"(e) Nothing contained in Title 35, as enacted by section 1 hereof, shall operate to nullify any judicial finding prior to the effective date of this Act on the validity of any patent by a court of competent jurisdiction." Patent Act of 1952, Public Law 593, C. 950, 66 Stat. 815.

QUESTIONS PRESENTED FOR REVIEW.

Respondent cannot agree with the presentation of the questions for review as set forth in the Petition. The complicated and argumentative manner of their statement, depending on and involving not only matters which are not in evidence, but also rulings of the District Court on defenses which have no relevance to the findings and conclusions of the Courts below on which the patent-in-suit has been held invalid, makes it practically impossible to respond to the proposed questions.

Actually, this case presents no question or issue which would justify or require review by this Court.

While there may be interesting legal points involved in the District Court's Opinion—and so, in the Court of Appeals' affirming, adoptive, Per Curiam Opinion—there are no special or important reasons or grounds, as required under the rules and established precedents of this Court, which call for review of this case on Writ of Certiorari.

There is in this case no conflict of decision, either in the Courts below, or between their unanimous Opinions and the decision of any other District Court or Court of Appeals on the patent-in-suit. This is the only case in which the patent has been litigated.

There is here no important question of federal law which has not been settled by this Court; nor any decision in the Opinions below of any federal question in conflict with applicable decisions of this Court; nor any departure from the accepted and usual course of judicial proceedings; nor any question of great or public interest.

STATEMENT OF THE CASE.

The Proceedings Below.

This was an ordinary patent infringement suit, for which plaintiff (petitioner here) demanded a jury trial. However, at the conclusion of the proofs, on plaintiff's own suggestion, only three issues were submitted to the jury; namely, (1) whether the patented subject matter [2] involved invention, (2) whether the patentee was the true inventor, and (3) the amount of damages in the event of judgment for plaintiff. By stipulation, all other issues of fact and law were reserved for the Court's determination without a jury (300a-301a).

After considering the case on extensive briefs, the District Court in a written Opinion (306a-318a) held the patent invalid on two different grounds.

On defendant's (respondent here) Motion for Judgment n. o. v., **the Court held the patent invalid as lacking invention**, and set aside the jury's general verdict for the plaintiff (314a/1-12).

In addition, **on one of the issues reserved for its determination without a jury, the Court held the three claims of the patent invalid for want of definiteness** (315a/20-27).

Thereafter, plaintiff moved for re-argument and reconsideration of defendant's Motion for Judgment n. o. v., for modification of the Opinion on both grounds on which the patent had been held invalid, for a new trial, and to reopen (318a-341a). Those motions were denied after consideration on extensive briefs and a full day's argument (341a-342a).

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2. A meter for measuring rate-of-flow of fluids—hence, a "flowmeter", and specifically, that type known as a "rotameter". Two of the three patent claims are for a rotameter, the other is for a ribbed rotameter tube. (14a-15a)

The Court of Appeals for the Third Circuit, affirming unanimously, characterized the District Court's Opinion and Orders as follows:—(615a, Sup. Apx. to Petition)

> ". . . These conclusions are set forth in a comprehensive Opinion filed by Chief Judge Kirkpatrick, 107 F. Supp. 1010. **We find ourselves in complete accord with his reasoning and conclusions and need add nothing thereto. They fully support the judgment appealed from."** [3]
>
> "The plaintiff urges that the district court erred in denying its subsequent motion for reargument or a new trial, in support of which it offered 25 documents as additional evidence which it alleged contradicted certain of the defendant's evidence. **The judgment n. o. v. was entered because of the insufficiency of the plaintiff's evidence,** however.[4] Moreover the documents did not in any event qualify as after discovered evidence. We find no error in the denial of the motion."

On the Issue of Invention.

The subject of the patent-in-suit is an assembly of old mechanical elements, all of which are found in the prior art. This is undisputed.

Each of the three elements functions in the patented assembly in the same way in which it did in the prior art combinations in which it is to be found.

Findings as above are specifically made in the Opinion (307a/22-end).

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3. Accordingly, all subsequent references to the Opinions or decisions below, or to the findings and conclusions thereof, necessarily are to those of the District Court as found at pages 306a-315a of Volume I of the Joint Appendix.

4. Emphasis in quotations added throughout this brief.

The same basic combination is disclosed [5] and claimed [6] in the prior art Cox patents, under which respondent is licensed (128a/1-5). As stated in the Opinion (308a/1-10):—

"The tube shown in the Cox 2,384,800 patent is in all respects the tube of the patent in suit, except that its guiding ribs are wide and have concave guiding surfaces, conforming to the circular shape of the float. What the plaintiff did was to take a Cox tube and remodel it so that instead of rather wide concave surfaces, the float would be guided by the points at the top of comparatively narrow convex ribs, which took the place of Cox's.* These were in all respects the ribs or bead guides of Feldkamp [7] and several other earlier patents."

* "It is to be remembered that the rib of both tubes were of glass molded as an integral part of the whole tube." (footnote in Opinion)

During the prosecution of the application for the patent-in-suit,[8] the Patent Office repeatedly rejected the application on one of the same grounds; namely, lack of invention, on which the Courts below have held the patent invalid (18a/1-3; 19a-20a).

After those rejections, and even after a personal interview between petitioner's present counsel and the Patent Office examiners, during which the cited Cox patents were

5. Cox patents 2,384,800 (DX-13); 2,389,957 (DX-22); 2,403,849 (DX-15) and 2,417,352 (PX-40); respectively located in the Record in Volume II of the Joint Appendix at pages 508a, 558a, 516a and 408a; and the first three of which are also included in the "Parts of Volume II of the Joint Appendix" filed with the Petition.

6. e.g., claim 10 of Cox Patent 2,417,352. (414a)

7. The Feldkamp patent (503a-507a) was not cited in the prosecution of the Fischer application. But it was pleaded and relied on at the trial. It shows (see especially Fig. 4 at 503a and description at 505a/80-85) three, small, convex, vertically extending, close-fitting, glass guide ribs 15, which maintain the indicator float 13 centralized in its vertical movement in a tubular chamber 7.

8. Hereafter referred to as the Fischer application or patent.

discussed (22a-23a), **the Patent Office again and finally rejected the Fischer application** on the following basis (23a/20-28):—

> ". . . Thus, the alleged novelty resides in the rib design of the rotameter tube. Applicant's rib design does not constitute a patentably novel rotameter tube since **the use of the rib shown by Winton or Gillum[9] of record, in the tube of Cox is considered obvious and produces no unexpected result.** Further, applicant's rib design is tantamount to merely increasing the width of the grooves of the tube shown by the Cox patent to obtain substantially line contact."

In response to this final rejection, petitioner's counsel filed a long, involved and technical-sounding argument, as the result of which the application was allowed. That argument included, inter alia, the following assertions:—

> ". . . **Cox obtains** a rate-of-flow meter which inherently has a **substantially lesser viscosity-immunity** than the rate-of-flow meter of applicant's construction . . ." (28a/14-18)
>
> • • •
>
> "It will thus be seen that **applicant's construction differs from Cox's construction not in degree but rather in kind, because** applicant's construction embodies constructional features by which **the viscosity-sensitivity is substantially reduced if not, indeed, substantially eliminated.**" (31a/9-13)
>
> • • •
>
> ". . . the distinctions which they [the three claims of the Fischer patent] present over the Cox patents are **inventive and patentable, in that applicant's construction, defined by these claims, is productive of a new, useful and unexpected result** of great technological import and representing a substantial practical advance in the art." (32a/5-10)

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9. The Gillum patent, exhibit DX-14 (513a-518a) was one of the "several other earlier patents" referred to in the above quotation from the Opinion. (page 5, supra)

The application file of the Fischer patent **contains no proofs**, even by way of affidavit, in support of the bald assertions made in the argument upon which the patent was granted following the final rejection as noted above.

When faced at the trial (cf. Opinion, 308a) with the same fatal finality as to the **absence of invention** in the patented flowmeter, plaintiff tried to fall back on the same ground upon which the Patent Office had been induced to issue the patent. In so doing, plaintiff presented testimony, chiefly that of its expert witness, Platt,—

> ". . . to the effect that the patent produced new results of great practical and commercial value by which, the plaintiff contended, the whole group of old elements exceeded the sum of its parts, added to the sum of useful knowledge and gave the character of invention to the assembly. See A & P Tea Co. v. Supermarket Corp., 340 U. S. 147, 152. . . ." (Opinion, 308a)

In considering and evaluating the asserted new results, **the Court considered only plaintiff's own evidence** and specifically excluded any consideration of defendant's evidence (Opinion, 314a/13-18).

Regarding the *result* of reduced friction from the line-contact provided by the convexly-shaped guide ribs (abandoned and not relied on in the argument to the Patent Office following the final rejection), the Courts below agreed with the appraisal of plaintiff's expert Platt that this is "not a very strong point" (308a-309a).

Other incidental *results* which plaintiff's expert Platt testified about, were that the steel mandrels on which the Fischer tubes are made are comparatively easy to machine, and that the Fischer tubes are also comparatively easy to manufacture.[10] In evaluating these points, the Courts below held that such were not the kind of *results* upon which invention can be predicated, and pointed out that Platt had

10. The claims-in-suit define the rotameter and the tube itself, but not the mandrels, or the method of manufacturing either the rotameter tube or mandrels (14a-15a).

agreed that within their range, the Cox tubes, although more difficult to make, were as accurate as Fischer's (309a/5-28).

As in the argument to the Patent Office in response to the final rejection, the *result* mainly relied on by plaintiff throughout this litigation to import *invention* into the Fischer flowmeter, was its so-called "viscosity-immunity". This is a highly technical concept and its exposition is not necessary for a determination on the Petition here. Suffice it to say that the Opinion includes findings of fact:—

(1) that the assembly of the patent does not give complete immunity to viscosity changes (312a/8-11);

(2) that the asserted new result as to viscosity-immunity was one of degree only, not amounting to a difference in kind (312a/15-28 & 315a/20-30);

(3) that the rotameters of both the prior art Cox patents and the Fischer patent have satisfactory viscosity-immunity throughout their respective ranges, although the immunity range of the Fischer device was some 20 to 25 percent greater (312a/17-20); and

(4) that within its range the Cox device is somewhat more accurate than the Fischer device (312a/21-22).

As the Opinion points out, those findings were based "entirely upon the plaintiff's own evidence" (314a/3-4). In formulating those findings, the Opinion specifically refers to the plaintiff's "own court room demonstration" of the patented Fischer rotameter (312a/10), and exclusively refers to and quotes from the testimony of plaintiff's expert Platt (308a-313a).

Plaintiff's court room demonstration establishes that the rotameter of the Fischer patent is so sensitive (that is, non-immune) to changes in viscosity of the liquid whose flow is being measured, that its readings are about 20 percent off, while the most viscosity-sensitive prior art rotameter was only about 33 percent off. The standard of comparison for both of those measurements was readings at the same rates of flow on the best viscosity-immune prior art

rotameter—the wire-guided type having a thin-edged float (45a-48a, see also Opinion at 312a/10-13).

The most significant feature of plaintiff's court room demonstration was the complete absence of any demonstration that the rotameter of the Fischer patent had any improvement in viscosity-immunity over the prior art Cox rotameter.

It was on arguments based on that unproved hypothesis that the Patent Office had been induced to allow the patent. But when the time came to sustain the validity of the patent, plaintiff failed to present any demonstration in support of its mere assertion of improved viscosity-immunity.

The Opinion also points out that plaintiff's expert Platt attributed even the improved viscosity-immunity *range* of the Fischer rotameter entirely to the use of smaller convex ribs in place of the ribs of the Cox patents (310a). As a basis for its conclusion that any difference in the viscosity-immunity *range* of the patented Fischer rotameter and the rotameter of the prior art Cox patents was one of degree only (312a/10-13), the Court had found from Platt's testimony—

> ". . . that **the point at which, in his [Platt's] opinion, invention really was to be found is nothing more or less than the reducing of the bulk of the guide means,** so that they would occupy a smaller cross section of the tube and allow a less obstructed passage around the float . . . and so help to reduce viscosity sensitivity. In other words, **the point-guide feature of the ribs had little or nothing to do with it and their convexity was important solely because that shape left more space in the tube for the liquid. . . .**" (310a/20-31)

The Opinion also quotes from Platt's testimony that an increase in the number of ribs in the patented structure would give "very nearly the same result" as obtained with the rotameter of the Cox patents (311a/8-15).

Based on these findings, the Courts below held the patent invalid for lack of invention (314a).

On the Issue of Claim Indefiniteness.

On the issue, which was reserved for the District Court's determination without a jury, as to whether the invention is pointed out and claimed with the particularity and distinctness required under the Patent Statutes,[11] the Courts below also held the patent invalid (315a).

The conclusion on this issue rests on findings of fact, which are also fundamentally related to the issue of invention as discussed above, that:—

> "the improvement in viscosity-immunity which the plaintiff claims as the new result arises from the size and number of ribs rather than their shape." (314a-315a)
>
> and
>
> "if enough of the bead guides of the Fischer type were used there would be hardly any improvement over Cox." (315a/5-7)

Those findings are also based entirely on the testimony of plaintiff's expert witness Platt (314a/21-23), which included, inter alia, his testimony wherein:—

> 1. when asked to apply the words "relatively small circumferential dimension" (as employed in the claims to define the guide ribs) to a specific case; namely, to a rib of the flowmeter tube shown in exhibit DX-53 (572a), Platt could not say whether that rib was of relatively small or relatively large circumferential dimension, because as he said, "I have no criterion for comparison." (297a/4-8 & 14-16);
>
> 2. he could find no norm or standard in the specification to which to refer in determining whether a specific rib is "of relatively small circumferential dimension" (297a/28-30);

---

11. 35 U. S. C. 33 (R. S. 4888), as set out at page 32 of the Petition.

3. he admitted that the Fischer patent does not tell whether the "circumferential dimension" is the dimension at the base of the rib, at its tip, or at some intermediate point (289a/29-32); and

4. having informed the Court that the size and number of ribs rather than their shape is the vital point (314a-315a), he stated that if the number of ribs shown in the patent were increased, the result would be very nearly the same as in the Cox patents (293a/25-32), also admitting that the Fischer patent does not say how many ribs constitute "a plurality", as called for by the claims (293a/22-24).

As to both grounds upon which the patent has been held invalid, it is most significant that **there is no disclosure or discussion in the patent regarding the so-called viscosity-immunity, or regarding the claimed characteristics of the ribs** which attempt to distinguish the alleged invention from the Cox prior art patents.

As noted above, the concept of viscosity-immunity and the *result* assertedly obtained therein by the patented structure was introduced into the prosecution of the Fischer application for the first time in the argument made in response to the final rejection. The patent itself is devoid of any reference to this concept or *result*.

Likewise, neither the specification nor claims reveal (1) any standard or norm for determining when the circumferential dimension of a given rib is "relatively small"; (2) what is meant by the "circumferential dimension" of the ribs; (3) where that dimension is to be measured; or (4) how many ribs constitute "a plurality", as that term is employed in the claims.

In holding the claims invalid for want of definiteness, the District Court found (with reference to these terms) that there is nothing in the disclosure of the entire patent which would tell the public what they can do to avoid infringement, or where infringement begins (315a/20-27).

ARGUMENT.

Comments on Reasons Relied on by Petitioner for Grant of Writ of Certiorari.

Comment I.

The decisions of the Courts below are not in conflict with this Court's decision in *Great Atlantic & Pacific Tea Co. v. Supermarket Corp.*, 340 U. S. 147, 71 S. Ct. 127,[12] or any other decision cited in the Petition.

From the foregoing Statement of the Case it is clear that the decisions below are in strict accord with the principles and rules of law enunciated in the *A & P* decision, and in earlier decisions of this Court which have expressed the standard of invention for devices which are mere assemblies of old mechanical elements; e.g., *Atlantic Works v. Brady*, 107 U. S. 192, 2 S. Ct. 225 (1883); *Lincoln Engineering Co. of Illinois v. Stewart-Warner Corporation*, 303 U. S. 545, 58 S. Ct. 662 (1938); *Toledo Pressed Steel Co. v. Standard Parts, Inc.*, 307 U. S. 350, 59 S. Ct. 897 (1939); and *Cuno Engineering Corporation v. Automatic Devices Corporation*, 314 U. S. 84, 62 S. Ct. 37 (1941).

Petitioner cannot now seriously contend that the law of the *A & P* decision is not applicable to the present case. In the Patent Office, as in this litigation, **petitioner has rested the validity of the patent-in-suit on the new results assertedly obtained thereby** (cf. pages 7-10, *supra*). This it had to do, because the complete basic combination comprising a tapered glass tube, integrally formed ribs in the tube, and a float fitted within and guided by the ribs, was fully disclosed in the prior art Cox patents. In addition, the prior art Feldkamp patent shows three, small, convex, vertical, glass, guide ribs substantially identical in structure and function to the guide ribs of the Fischer patent.

12. Hereafter referred to as the *A & P* case or decision.

The following statements of law from the *A & P* decision demonstrate the complete and devastating applicability thereof to the patent-in-suit:—

On the issue of invention—

". . . The conjunction or concert of known elements must contribute something; only when the whole in some way exceeds the sum of its parts is the accumulation of old devices patentable. . . . this is not a usual result of uniting elements old in mechanics. **This case is wanting in any unusual or surprising consequences from the unification of the elements here concerned,** . . .

* * *

"Courts should scrutinize combination patent claims with a care proportioned to the difficulty and improbability of finding invention in an assembly of old elements. . . . A patent for a combination which only unites old elements with no change in their respective functions such as is presented here, obviously withdraws what already is known into the field of its monopoly and diminishes the resources available to skilled men. . . ."

On the issue of claim indefiniteness—

". . . the extension is not mentioned in the claims, except, perhaps, by **a construction too strained to be consistent with the clarity required of claims which define the boundaries of a patent monopoly.** 38 Stat. 958, 35 U. S. C. § 33, 35 U. S. C. A. § 33; United Carbon Co. v. Binney & Smith Co., 317 U. S. 228, 63 S. Ct. 165, 87 L. Ed. 232; General Electric v. Wabash Appliance Corp., 304 U. S. 364, 58 S. Ct. 899, 82 L. Ed. 1402. . . ."

Petitioner argues the applicability of the rule requiring difference in kind, and not merely difference in de-

gree, for determining whether there are present the "unusual or surprising consquences" required to constitute invention in an assembly of old mechanical elements.

The basic fallacy in such argument is at once apparent from the foregoing quotations from the *A & P* decision. In addition, the principle of law specifically applied by the Courts below on this point (Opinion, 313a), is that stated as follows in 1951 by the Court of Appeals for the Sixth Circuit in *United Specialties Co. v. Industrial Wire Cloth Products Corp.*, 186 F. 2d 426, 429:—

> ". . . When we search for **new and beneficial results** achieved we consider the words of the inventor himself. . . . The difference is one of degree and **it has never been thought that mere difference in degree denotes invention** except perhaps in those rare cases where the difference in degree is so marked and involves the solution of a problem long recognized but not earlier solved, so that a difference in degree becomes in effect a difference in kind."

The basic and original expression of that principle of law is found in this Court's decision in *Smith v. Nichols*, 21 Wall. 112 (1875):—

> ". . . But a mere carrying forward or new or **more extended application of the original thought, a change only in form, proportions or degree,** the substitution of equivalents, doing substantially the same thing in the same way by substantially the same means **with better results, is not such invention as will sustain a patent.**"

That is still the law today, the rule in *Smith v. Nichols* never having been substantially modified or overruled, and having been reaffirmed by the following and other decisions of this Court:—

Roberts v. Ryer, 91 U. S. 150 (1875);

Railroad Supply Company v. Elyria Iron & Steel Company, 244 U. S. 285, 37 S. Ct. 502 (1917).

It is noteworthy that the *United Specialties* decision is by the same Court of Appeals whose earlier decision in the *A & P* case had been reversed by this Court. Indeed, the basic principles of **the law of invention** upon which the *United Specialties* case turned, as specifically set forth in that decision at 186 F. 2d 428, were the exact principles enunciated by this Court's decision in the *A & P* case, as quoted above.

Petitioner's argument that the *A & P* decision has been improperly applied in the present case is based upon the assertion that the patent-in-suit relates to a *"scientific"* improvement, as distinguished from what has frequently been referred to as a *"gadget"*. We need not argue here whether a minor change in only one of three elements of an old combination; namely, substituting the completely convex guide ribs of the prior art Feldkamp patent, to provide a line-contact guiding surface, in place of the generally convex ribs of the prior art Cox patents, is the sort of change which might even remotely be considered as a *scientific* improvement. Suffice it to say that the majority opinion of this Court in the *A & P* case makes no reference to a *gadget*, and the principles of law therein stated refer to the "result of uniting elements old in mechanics", without mention of the *scientific* status of the patented subject matter.

Petitioner's arguments and implications that the *A & P* decision has been applied by the several Courts of Appeals only to invalidate patents for *gadget* improvements is without foundation. The principles of law of the *A & P* decision, applied by the Courts below in the present case, have likewise been applied by all the Courts of Appeals to invalidate patents for improvements which were at least the equal *scientifically* of the flowmeter of the Fischer patent. For example:—

McCord Corp. v. Beacon Auto Radiator Co., Inc., 193 F. 2d 985 (CA-1, 1952)—two patents, one for method of

making heat exchange cores, and the other for heat exchange core (automobile radiators);

Schreyer et al. v. Casco Products Corp., et al., 190 F. 2d 921 (CA-2, 1951) Cert. denied 342 U. S. 913, 72 S. Ct. 360—electric steam iron;

Packwood v. Briggs & Stratton Corp. et al., 195 F. 2d 971 (CA-3, 1952) Cert. denied 344 U. S. 844, 73 S. Ct. 61—power lawn mower with air filter screen;

Stanley Works v. Rockwell Mfg. Co., 203 F. 2d 846 (CA-3, 1953) Cert. denied 346 U. S. 818, 74 S. Ct. 30—safety shield for grinders;

Kay Patents Corp. v. Martin Supply Co., Inc., et al., 202 F. 2d 47 (CA-4, 1953)—two patents for holders for gaseous discharge lamps;

Graham et al. v. Jeoffroy Mfg., Inc., et al., 206 F. 2d 769 (CA-5, 1953)—brace clamp for holding shanks of ground-working tools;

Patrol Valve Co. v. Robertshaw-Fulton Controls Co., 210 F. 2d 146 (CA-6, 1954)—thermostatically controlled pilot cut-off valve;

General Time Corp. v. Hansen Mfg. Co., 199 F. 2d 259 (CA-7, 1952) Cert. denied 344 U. S. 934, 73 S. Ct. 505—electric synchronous motor;

Continental Farm Equipment Co., Inc. v. Love Tractor, Inc., 199 F. 2d 202 (CA-8, 1952) Cert. denied 345 U. S. 909, 73 S. Ct. 649—disc harrow;

Berkeley Pump Co. v. Jacuzzi Bros., Inc., 214 F. 2d 785 (CA-9, June, 1954)—high-low pressure pumping system;

Kobe, Inc. et al. v. Dempsey Pump Co. et al., 198 F. 2d 416 (CA-10, 1952) Cert. denied 344 U. S. 837, 73 S. Ct. 46—hydraulically operated pumping mechanism.

The Opinions below in the present case are in accord not only with the decisions of this Court referred to at page 12 supra, but also with the uniform application of the *A & P* decision by all of the Courts of Appeals, as exemplified by the foregoing citations.

Comment II.

On the issue of indefiniteness of the patent claims, the decisions below are not in conflict with the decisions of this Court or the Courts of Appeals, as cited in the Petition. Indeed, the decisions below are in full accord with the law on this point as set forth in the above quotation from this Court's decision in the *A & P* case, and also with the basic decisions of this Court on claim definiteness in *United Carbon Co., et al. v. Binney & Smith Co.*, 317 U. S. 228, 63 S. Ct. 165 (1942) and *General Electric Co. v. Wabash Corp.*, 304 U. S. 364, 58 S. Ct. 899 (1938).

In the *United Carbon* case the invention was a product —(not a chemical or a chemical composition-of-matter as suggested by petitioner)—namely, carbon black, claimed in physical terms "in the form of . . . comparatively small . . . aggregates. . .".

In the present case the invention is also a product—namely, a flowmeter and flowmeter tube, including guide beads or ribs claimed in physical terms as "having relatively small circumferential dimension."

In the *United Carbon* case, as in the present case the patent did not specify any standard or norm for determining when the claimed elements are "comparatively small" or "relatively small", respectively.

Here, as in the *United Carbon* case, the only testimony on the subject of the claim terminology in question was that of the patentee's own witness. In both cases that testimony demonstrated that there is no specified or recognized standard for determining the meaning of "comparatively small" as applied to aggregates of carbon black,

or of "relatively small circumferential dimension" as applied to flowmeter guide ribs. When asked whether a flowmeter guide rib shown in exhibit DX-53 (572a) was "relatively small" compared to the circumference of the tube opening, plaintiff's expert in the present case was unable to answer, because as he said, "I have no criterion for comparison" (297a).

The conformance of the decisions below, on the issue of claim indefiniteness, with the decisions of other Courts of Appeals is exemplified by the very recent decision of the Court of Appeals for the Ninth Circuit in *Barkeij v. Lockheed Aircraft Corp.*, 210 F. 2d 1 (Feb., 1954). In that case, as here, the claims-in-suit, for a mechanical product, were held invalid for want of definiteness, based upon the testimony of the patentee's own expert witness. Regarding claim terminology such as "relatively small volume" and "substantially closer than", the *Barkeij* decision states at page 2:

> ". . . In view of Barkeij's expert witness' testimony that in constructing internal combustion engines 'a very little difference will make a great deal of difference in the operation,' we do not see how the uncertain and indefinite terms used in the patents can be said to 'clearly distinguish what is claimed from what went before in the art and clearly circumscribe what is foreclosed from future enterprise.'" (citing United Carbon Co. v. Binney & Smith Co. and General Electric Co. v. Wabash Corp., supra)

Here, the District Court's findings of fact on this issue —which was reserved for the Court's determination without a jury—and the fundamental relation between the issues of invention and indefiniteness, as discussed above and as recognized by the Opinion (314a-315a), renders the following statement from the *United Carbon* decision particularly applicable to and dispositive of the present case:—

". . . Whether the vagueness of the claim has its source in the language employed or in the somewhat indeterminate character of the advance claimed to have been made in the art is not material. An invention must be capable of accurate definition, and it must be accurately defined, to be patentable." (317 U. S. 228, 63 S. Ct. 165)

Comment III.

The power and obligation of a trial court to set aside a jury's verdict on the question of invention, under appropriate circumstances, is well established by uniform decisions of the Courts of Appeals which have ruled on the matter. Those decisions are based on principles enunciated by this Court.

The leading cases on this point are those of the Third Circuit Court of Appeals; namely, *Ryan Distributing Corporation v. Caley*, 147 F. 2d 138 (1945) and *Packwood v. Briggs & Stratton Corp. et al.*, 195 F. 2d 971 (1952).[13]

The applicable and controlling law is stated in the *Packwood* decision as follows:—

". . . A jury in a patent case is not free to treat invention as a concept broad enough to include whatever discovery or novelty may impress the jurors favorably. . . . rules and standards have been developed for use as guides to the systematic and orderly definition and application of such a conception as invention in accordance with what the courts understand to be the true meaning of the Constitution and the patent laws. Once such standards and rules are authoritatively announced any finding of 'invention' whether by a court or a jury must be consistent with them.

13. On the issue of invention and on the propriety of the trial court setting aside a jury's verdict thereon, the present case is "on all fours" with the *Ryan* and *Packwood* cases, and the Opinion below quotes and cites the controlling principles of law from both of those cases. (306a, 307a & 313a-314a)

". . . And so it is throughout the body of the common law. This authority and responsibility to keep jury findings within reasoned rules and standards is an essential function of United States judges today as it long has been of common law judges. See Capital Traction Co. v. Hof, 1899, 174 U. S. 1, 13-16, 19 S. Ct. 580, 43 L. Ed. 873. It stands as a great safeguard against gross mistake or caprice in fact finding.

* * *

"In Ryan Distributing Corp. v. Caley, 3 Cir., 1945, 147 F. 2d 138, 142, this court pointed out that entry of judgment n. o. v. is the appropriate corrective action when a jury has found a patent valid although the court's application of defining principles reveals 'a clear-cut case of lack of invention'. . . ." (195 F. 2d 971, 973)

Certiorari was denied in both the *Ryan* case (325 U. S. 859, 65 S. Ct. 1199) and the *Packwood* case (344 U. S. 844, 73 S. Ct. 61) on Petitions specifically raising the issue of the propriety of a trial court setting aside a jury's verdict on the question of invention.

The Ninth Circuit Court of Appeals in its decision in *Himes et al. v. Chadwick*, 199 F. 2d 100 (1952) and in its very recent decision in *Berkeley Pump Co. v. Jacuzzi Bros., Inc.*, 214 F. 2d 785 (June, 1954), has specifically adopted the law as enunciated and applied in the *Ryan* and *Packwood* cases. The Petition disregards these later decisions and relies on the 1949 decision of the Ninth Circuit Court of Appeals in *Cutter Laboratories v. Lyophile-Cryochem Corp.*, 179 F. 2d 80.

Furthermore, from the report of the *Cutter Laboratories* case it appears that the District Court had not either directed or set aside the jury's verdict. The jury had returned a verdict that each of the patent claims in

suit was valid and infringed. Nevertheless, the Court of Appeals itself, at least partially overruled the jury's verdict, finding some of the patent claims invalid.

Regardless of the propriety of a trial court setting aside a jury's general verdict on the issue of invention, review of the present case by Writ of Certiorari on such ground is not justified or appropriate, because, by the unanimous decisions of the Courts below, the patent-in-suit has also been held invalid for want of definiteness in its claims—that issue specifically having been reversed by stipulation for determination by the Court without a jury.

Furthermore, even on the issue of invention, no question of the jury's province of judging the credibility of the witnesses was involved in the present case. The judgment n. o. v. was granted because of the insufficiency of the plaintiff's evidence, which was accepted by the trial court as verity, and without any consideration of the defendant's evidence.

Comment IV.

This case involves no question of great or public importance because the decisions of the Courts below are based upon and are in accord with the settled law of patents as enunciated in the *A & P* decision and the earlier decisions of this Court referred to above, and as also recently and uniformly expressed by all the Courts of Appeals in the decisions cited above (pages 15-19 supra).

The present case is also of no general interest or import because it was decided under the Patent Statutes in effect prior to the Patent Act of 1952, which became effective January 1, 1953. This Court would not be justified and should not be called on to review the principles of law involved in the decisions below as applied to the repealed Patent Statutes under which this case was decided.

The Petition Is Particularly Lacking in Merit.

Not only is the Petition unfounded in fact and law, as demonstrated above, but it is also based upon representations not supported by, and indeed, contrary to the evidence of the case and the findings of the Courts below. We list here but a few examples:—

1. Cox patent 2,604,784, and its file history, which are extensively referred to throughout the Petition, are not even in evidence. The Court of Appeals, in affirming the District Court's Orders denying plaintiff's Motions for reargument, new trial, etc., held that the motion-documents (which included this Cox patent and file), "did not in any event qualify as after-discovered evidence" (615a).

2. The references in the Petition to statements in the Opinion that "Cox's conception of flutes or ribs for his tubes was something entirely different", and that the Cox rotameters "do not embody the concept described in the patent, and . . . they cannot be asserted against the validity of the patent . . .", are taken from that portion of the Opinion (316a-317a) having to do only with the Court's decision on defenses other than lack of invention and indefiniteness of the claims.

Those statements are made with reference to the Court's rulings on defenses that Cox, rather than Fischer, was the inventor of the patented flowmeter, and that the Fischer patent was invalid because of certain prior public uses and sales. Such statements and rulings have no relevance to either of the grounds on which the Fischer patent has been held invalid.

3. None of the 21 patents referred to at pages 39 and 40 of the Petition is in evidence. Their consideration, even by the trial court, would have violated the fundamental

rule of evidence which excludes matters that raise offending collateral issues.

4. The transcript of the hearing in the Court of Appeals, and the excerpts therefrom as included at pages 602a-614a of petitioner's Supplemental Appendix, constitute no part of the evidence, or the findings, or the law of this case.

Those excerpts are presented in the Supplemental Appendix with significant and misleading omissions.

In view of the Court of Appeals unanimous Opinion, completely adopting the Opinion of the District Court, the transcript of the hearing in the Court of Appeals is irrelevant to any questions properly raised by the Petition.

5. The Petition repeatedly asserts that the subject matter of the Fischer patent is "admittedly unanticipated", and uses that assertion as a basis for arguing invention and claim definiteness.

The following is the stipulation of counsel for respondent, made during the trial, upon which petitioner's assertion is based:

> "Mr. Chappell: Well, I will agree that none of the language of any of the claims . . . of the patent in suit, will read directly on any of the structures shown. However, **I do not want that to carry with it any concession that there is anything in the nature of invention or that the claim is clear enough so you can tell absolutely.**" (221a/1-7)

That stipulation was expressly confined, by the preceding colloquy between the Court and counsel, to the prior art patents.

Petitioner's misguided use of this stipulation is without reason or justification.

CONCLUSION.

Respondent submits that the Petition should be denied for the reasons set forth above, and also because the Petition fails to present with accuracy, brevity and clearness that which is essential to a ready and adequate understanding of the points for consideration, as required by paragraph No. 4 of Supreme Court Rule 23.

The decisions of the Courts below are manifestly correct and express the applicable, settled law of patents as uniformly applied throughout the country. The adjudication involves merely the particular application of well settled rules of law to facts peculiar to this case. It presents no question of general importance, or any other of the usual or recognized grounds for Certiorari.

Respectfully submitted,

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Dated at Philadelphia,
Pennsylvania, October 13, 1954.

RALPH L. CHAPPELL,
Of Counsel.